MUHAMMED HASSAN

v.

PUBLIC PROSECUTOR

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
EDGAR JOSEPH JR FCJ
NH CHAN JCA
[CRIMINAL APPEAL NO: 05-122-93]
9 DECEMBER 1997

CRIMINAL LAW: *Dangerous drugs - Trafficking in cannabis - Presumption of trafficking - Dangerous Drugs Act 1952, s. 37(da) - Element of possession - Whether to be substantively proved - Whether presumption of trafficking under s. 37(da) can be applied where possession has not been proved independently but merely presumed by virtue of s. 37(d) - Dangerous Drugs Act 1952, ss. 37(d), 37(da) 39B(1)(a)*

CRIMINAL PROCEDURE: *Report or certificate - Criminal Procedure Code, s. 399(1) - Chemist report - Notice of intention to produce chemist report - Notice duly served on accused - Whether prosecution can decline to tender report in evidence - Whether entitled to call chemist as a witness - Whether proper for chemist to produce report in the course of giving evidence in court*

EVIDENCE: *Documentary evidence - Chemist report - Dangerous drugs - Trafficking in cannabis - Evidence of chemist - Whether inadequate to prove that subject matter of charge is cannabis - Omission to mention 'cannabis as defined in s. 2 of Dangerous Drugs Act 1952' - Whether fatal - Dangerous Drugs Act 1952, ss. 2, 39B(1)(a) - Evidence Act 1950, ss. 91, 92*

WORDS AND PHRASES: *"Found in possession" - Dangerous Drugs Act 1952, s. 37(da) - Whether includes 'presumed possession'*

The appellant herein was charged with an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 ('the Act'), for trafficking in 1748.8 grammes of cannabis, and was sentenced to death upon his conviction. The learned trial judge, in convicting the appellant thus, had relied *inter alia* on the evidence of the chemist ('PW3'), and the report that he tendered ('P11'), which together evinced that PW3 had duly conducted the standard tests on the drugs and had found them to be cannabis 'as defined in the Act'. The facts showed that, apart from calling PW3, the prosecution had also served a copy of the chemist report on the appellant under s. 399 Criminal Procedure Code ('CPC'). That being so, the appellant argued in this appeal that it was not open to the

prosecution, whilst relying on s. 399 CPC, to have called PW3 as a witness. Section 399 CPC aside, the appellant also argued that the learned trial judge was wrong in the findings that he made in respect of s. 37(d) and (da) of the Act. According to the appellant, the words as used by s. 37 (da) were 'found in possession', and since the appellant was only "deemed" by the learned trial judge "to be in possession" of the cannabis under the said s. 37(d), the presumption of trafficking under s. 37(da) could not therefore be invoked. The appellant's contention, in short, was that, in order to invoke s. 37(da), there ought to be an actual finding of possession as opposed to "deemed" possession.

The learned Deputy Public Prosecutor argued in essence that sub-ss. 37(d) and 37(da) of the Act, upon their proper reading, allowed for the automatic application of presumption upon presumption. In the circumstances, the following primary questions arose for the determination of the learned appellate judges, namely (i) whether PW3's evidence sufficiently proved that the subject matter of the charge was cannabis as defined in s. 2 of the Act (ii) whether the trial judge below erred in law in invoking s. 37(da) of the Act based on the presumption of s. 37(d) thereof.

Held:
Per Chong Siew Fai CJ (Sabah & Sarawak)

[1] In point of law, where a maker of a report is called as a witness, there is nothing to prevent him from tendering his report for the purpose of corroborating his own evidence though that was not the purpose P11 was tendered by PW3 here. In the circumstances, it is unnecessary to discuss and rely on ss. 91 and 92 of the Evidence Act 1950.

[2] Despite the chemist's omission to mention 's. 2' there is no doubt that the plant-materials seized from the appellant and analysed by PW3 was cannabis as defined under s. 2 of the Dangerous Drugs Act 1952.

[3] Section 399(1) CPC merely enables the report to be used but does not make it obligatory for the prosecution to make the report substantive evidence simply because it had served a copy thereof upon the accused in pursuance to s. 399(1). That being so, service of the notice of intention to produce the chemist's report under s. 399(1), *per se*, would not preclude the prosecution from subsequently declining to tender the report in evidence pursuant to the said s. 399(1) and calling PW3, as maker of the report, to give evidence at the trial as a witness.

[3a] In calling PW3, the maker of the report, as a witness, the prosecution not only had complied with the best evidence rule but had also afforded the appellant the benefit of cross-examining PW3, an opportunity which the appellant had indeed availed himself in this case. There is thus nothing improper in the production of the report by PW3 as maker thereof in the course of giving evidence in court.

[3b] The record also shows that the report was produced not as corroborative evidence but was merely mentioned and identified as one of the items handed over to the investigating officer. But even assuming that it was not tendered for the purpose of its being identified as an item handed to PW7, it was no more than corroborative evidence affirming PW3's evidence that he had examined and analysed the suspected drugs.

[4] In deciding the issue of the application of s. 37(da) upon a finding of custody or control under s. 37(d), it is necessary to bear in mind that both sub-ss. (d) and (da), being penal provisions, must be strictly construed and must not be extended beyond their clear meaning. It is also important to note that the wordings of the two subsections are clear and unequivocal and they must therefore be taken to mean exactly what they respectively say.

[5] There is a clear distinction between the word "deemed" used in s. 37(d) and the word "found" employed in s. 37(da) of the Act.

[5a] The "deemed" state of affairs in s. 37(d) (ie, deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only be established the basic or primary facts necessary to give rise to that state of affairs ie, the finding of custody or control. The word "found" in the operating phrase of s. 37(da), on the other hand, connotes a finding after a trial by the court.

[5b] Further, the basic or primary facts needed to raise "deemed" possession and "deemed" knowledge under s. 37(d) of the Act and those required to raise "presumed ... trafficking " under s. 37(da) are different. And thus, to come to the presumptions of possession and knowledge under s. 37(d), one need only to arrive at a finding of having had "in custody or under...control anything whatsoever containing" the drug (as opposed to the drug itself), whereas to arrive at the presumption of "trafficking" under s. 37(da), a finding of being "in possession" of the drug is necessary, in addition to proof of the relevant minimum quantity specified.

[6] The word 'found' in s. 37(d) must bear the same meaning as the word 'found' in s. 37(da). Both require evidential materials in attaining proof thereof and are vastly different from the word 'deemed' employed in the said s. 37(d). In the circumstances, to constitute "possession" under s. 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

[7] A comparison of s. 37(da) of the Act and s. 17 of the Misuse of Drugs Act (Revised 1997) of Singapore as on 6 November 1991 reveals that, in both cases, to invoke the presumption of trafficking, the element of possession must first be proved or found. It is also significant to state that there is no material difference between the words "proved to have had in ...possession" and the words "found in possession" used in the respective two Acts. Both necessitate a finding or proof of possession beyond reasonable doubt based on evidence.

[8] On the wording of s. 37(da) as it stands, to read the presumption of possession (ie, possession as understood in criminal law, with knowledge) provided in s. 37(d) into s. 37(da), so as to invoke against an accused a further presumption of trafficking (i.e presumption upon presumption), would not only ascribe to the phrase 'found in possession' in s. 37(da) a meaning wider that it ordinarily bears but would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused.

[9] The learned trial judge, therefore, had erred in law in using the presumption of possession under s. 37(d) of the Act to invoke the presumption of trafficking under s. 37(da) thereof. In the circumstances, the conviction so imposed is quashed and substituted with a conviction under s. 6 of the Act, for which the appellant is sentenced to imprisonment for a term of 16 years and 10 strokes of whipping.

[Appeal allowed; order accordingly.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu di sini telah dituduh dengan kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') kerana mengedar 1748.8 gram ganja, dan atas sabitan telah jatuhkan hukuman mati. Hakim perbicaraan yang bijaksana, apabila mensabitkan perayu, bergantung antara lainnya kepada keterangan ahli kimia ('SP3'), serta laporan yang beliau kemukakan ('P11'), yang secara bersesama menunjukkan bahawa SP3 telah menjalankan ujian-ujian standard ke atas dadah berkenaan dan mendapati bahawa dadah tersebut adalah ganja 'seperti yang ditakrif dalam Akta'. Fakta menunjukkan bahawa, selain memanggil SP3, pihak pendakwa telah juga menyerahkan sesalinan laporan kimia ke atas perayu di bawah s. 399 Kanun Prosedur Jenayah ('KPJ'). Oleh hal yang demikian, perayu dalam rayuan ini menghujah bahawa adalah tidak terbuka bagi pendakwaan, sementara bergantung kepada s. 399 KPJ, untuk memanggil PW3 sebagai seorang saksi. Selain persoalan s. 399 KPJ, perayu juga berhujah bahawa hakim perbicaraan yang bijaksana adalah salah dalam keputusannya mengenai s. 37(d) dan (da) Akta. Menurut perayu, perkataan yang digunakan oleh s. 37(da) adalah 'didapati ada dalam pemilikannya', dan oleh kerana perayu hanya 'dianggap' oleh hakim perbicaraan sebagai 'ada dalam pemilikannya' ganja berkenaan di bawah s. 37(d), anggapan mengedar di bawah s. 37(da) dengan itu tidak boleh digunakan. Secara rengkasnya, hujah perayu adalah bahawa, untuk menggunapakai s. 37(da), haruslah terlebih dahulu dibuktikan pemilikan sebenar dan tidak pemilikan yang 'dianggapkan'.

Timbalan Pendakwa Raya yang bijaksana secara intinya berhujah, bahawa kedua-dua seksyen kecil 37(d) dan 37(da), atas pengertiannya yang betul, telah mengizinkan pemakaian secara automatik anggapan atas anggapan. Dalam halkeadaan yang demikian, persoalan-persoalan penting berikut telah berbangkit untuk keputusan hakim-hakim rayuan yang bijaksana, ia-itu (i) samada keterangan SP3 menunjukkan dengan secukupnya bahawa halperkara tuduhan berkenaan adalah ganja sepertimana yang ditakrif oleh s. 2 Akta (ii) samada hakim perbicaraan di bawah tersilap bilamana menggunakan s. 37(da) Akta berdasarkan anggapan yang wujud di bawah s. 37(d).

Diputuskan:
Oleh Chong Siew Fai HB (Sabah & Sarawak)

[1] Sebagai satu hujah undang-undang, di mana seorang pembuat laporan dipanggil untuk menjadi saksi, tiada apa yang boleh menghalang beliau dari mengemukakan laporannya untuk tujuan menyokong keterangannya sendiri walaupun ini bukanlah tujuan P11 dikemukakan oleh SP3 di sini. Dalam halkeadaan sedemikian, ianya tidak perlu untuk membincang dan bergantung kepada ss. 91 dan 92 Akta Keterangan 1950.

[2] Walaupun ahli kimia gagal menyebut 's. 2' tidak wujud apa-apa keraguan bahawa bahan-tumbuhan yang dirampas dari perayu dan dianalisa oleh SP3 tersebut adalah ganja sepertimana ianya ditafsir di bawah s. 2 Akta Dadah Berbahaya 1952.

[3] Seksyen 399(1) KPJ hanya membolehkan sesuatu laporan itu digunakan tetapi tidak mengenakan apa-apa kewajipan ke atas pendakwaan untuk menjadikan laporan tersebut sebagai keterangan substantif hanya kerana mereka telah menyerahkan salinannya kepada tertuduh di bawah s. 399(1). Dengan sebab itu, penyerahan notis niat untuk mengemukakan laporan kimia di bawah s. 399(1), *per se,* tidak menghalang pihak pendakwaan untuk enggan mengemukakan laporan tersebut dalam keterangan kemudiannya dan memanggil SP3, selaku pembuat laporan tersebut, untuk memberi keterangan sebagai seorang saksi diperbicaraan.

[3a] Dalam memanggil SP3, pembuat laporan, sebagai saksi, pihak pendakwaan bukan sahaja telah mematuhi keperluan memberi keterangan terbaik tetapi telah juga memberikan peluang kepada perayu untuk menyoal balas SP3, peluang mana telah diambil faedah oleh perayu di sini. Jelaslah, bahawa tiada apa yang tidak kena dengan pengemukaan laporan oleh SP3, pembuat laporan tersebut, sewaktu memberi keterangannya di mahkamah.

[3b] Rekod juga menunjukkan bahawa laporan tersebut tidak dikemukakan sebagai keterangan sokongan tetapi hanyalah disebut dan dikenalpasti sebagai salah satu dari benda-benda yang diserahkan kepada pegawai penyiasat. Namun begitu, jika pun diandaikan bahawa pengemukaannya tidak dengan tujuan untuk mengenal pasti benda yang diserah kepada SP7 itu, ianya tidak lebih dari satu keterangan sokongan yang mengesahkan keterangan SP3 bahawa beliau telah memeriksa dan menganalisa dadah yang dicurigai itu.

[4] Dalam memutuskan isu penggunaan s. 37(da) berdasarkan dapatan jagaan atau kawalan di bawah s. 37(d), ianya mustahak untuk beringat bahwa kedua-dua seksyen kecil (d) dan (da), sebagai peruntukan hukuman, mestilah ditafsirkan dengan ketat dan tidak dikembangkan sehingga melampaui maksud jelasnya. Ianya juga harus disedari bahawa kata-bahasa dalam kedua-dua peruntukan ini adalah jelas dan dengan itu peruntukan-peruntukan tersebut hendaklah diberikan maksud sejajar dengan apa yang sebenarnya dikatakan oleh mereka.

[5] Terdapat perbezaan yang jelas di antara perkataan 'dianggap' yang digunakan dalam s. 37(d) dan perkataan 'didapati' yang digunakan oleh s. 37(da).

[5a] Halkeadaan 'dianggapkan' dalam s. 37(d) (yakni pemilikan dan pengetahuan yang dianggapkan) adalah dengan penguatkuasaan undang-undang dan tidak ada keperluan untuk membuktikan bagaimana halkeadaan tersebut dicapai. Apa yang perlu dibuktikan hanyalah fakta-fakta asas bagi membangkitkan halkeadaan tersebut, yakni dapatan jagaan dan kawalan. Perkataan 'didapati' dalam s. 37(da), sebaliknya, bererti satu dapatan selepas satu perbicaraan oleh mahkamah.

[5b] Selanjutnya, fakta-fakta asas yang diperlukan bagi membangkitkan pemilikan yang 'dianggapkan' serta pengetahuan yang 'dianggapkan' di bawah s. 37(d) Akta adalah berbeza berbanding dengan fakta asas yang diperlukan bagi membangkitkan 'dianggap ... mengedarkan' di bawah s. 37(da). Dan oleh itu, untuk mencapai anggapan pemilikan dan pengetahuan di bawah s. 37(d), seseorang hanya perlu kepada dapatan bahawa telah ada 'dalam jagaannya atau dibawah pengawalannya apa-apa sahaja yang mengandungi' dadah (dan bukannya dadah itu sendiri), sedangkan, untuk mencapai anggapan 'mengedar' di bawah s. 37(da), satu dapatan ada 'dalam pemilikannya' dadah berkenaan adalah perlu, selain dari bukti kuantiti minima yang ditetapkan.

[6] Perkataan 'didapati' dalam s. 37(d) dan yang terdapat dalam s. 37(da) mestilah memberi makna yang sama. Kedua-duanya memerlukan bahan-bahan keterangan bagi pembuktiannya dan adalah amat berbeza dari perkataan 'dianggap' yang digunakan dalam s. 37(d). Oleh hal yang demikian, untuk membuktikan 'pemilikan' s. 37(da) Akta, dan untuk memenuhi salah satu dari keperluan untuk membangkitkan anggapan mengedar dibawahnya, hendaklah wujud satu dapatan pemilikan yang afirmatif (yang bukan anggapan undang-undang) yang berdasarkan kepada keterangan, sebagaimana perkataan pemilikan tersebut difahami dalam undang-undang jenayah.

[7] Perbandingan s. 37(da) Akta dengan s. 17 Akta Salahguna Dadah (Disemak 1997) Singapura setakat 6 November 1991 menunjukkan bahawa, dalam kedua-dua kes, untuk menggunakan anggapan mengedar, elemen pemilikan hendaklah dibuktikan atau didapati wujud. Ianya juga penting untuk menyatakan bahawa tiada perbezaan material di antara perkataan 'proved to have had in ... possession' dan perkataan 'found in possession' yang terdapat dalam kedua-dua Akta. Kedua-duanya memerlukan kepada dapatan atau bukti pemilikan tanpa keraguan munasabah berdasarkan keterangan.

[8] Berdasarkan kata-bahasa s. 37(da) sebagaimana adanya, untuk menerapkan anggapan pemilikan (yakni pemilikan seperti yang difahami dalam undang-undang jenayah, dengan pengetahuan) yang terdapat dalam s. 37(d) ke dalam s. 37(da), agar anggapan mengedar yang selanjutnya boleh dikenakan terhadap seseorang tertuduh, (yakni anggapan atas anggapan), samalah seperti memberikan kepada perkataan 'didapati dalam pemilikannya' dalam s. 37(da) satu makna yang lari dari maksud biasa peruntukan tersebut. Ianya juga adalah bertentangan dengan prinsip yang lama terpakai berhubung pentafsiran statut hukuman dan adalah sangat zalim and menekan tertuduh.

[9] Oleh itu, hakim perbicaraan yang bijaksana adalah silap apabila beliau menggunakan anggapan pemilikan di bawah s. 37(d) Akta untuk membangkitkan anggapan mengedar di bawah s. 37(da). Oleh hal yang demikian, sabitan yang beliau kenakan dibatalkan dan diganti dengan satu sabitan di bawah s. 6 Akta, untuk yang mana perayu dikenakan hukuman penjara selama 16 tahun dan 10 sebatan.

[Rayuan dibenarkan; perintah sekadarnya.]

Cases referred to:
Black-Clawson International Ltd v. Papierwerke AG [1975] 2 WLR 513 HL ***(refd)***
Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 ***(refd)***
Liew Sai Wah v. PP [1968] 2 MLJ 1 PC ***(refd)***
Low Kok Wai v. PP [1994] 1 SLR 676 CCA ***(refd)***
Magor & St Mellons Rural District Council v. Newport Corp [1952] AC 189 HL ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073 ***(refd)***
Mohd Yusof Said v. PP [1996] 2 CLJ 13 ***(refd)***
Pepper (Inspector of Taxes) v. Hart [1992] 3 WLR 1032 ***(refd)***
PP v. Adetunji Adeleye Sule [1993] 2 MLJ 70 SC ***(refd)***
PP v. Lam Peng Hoa & Anor [1996] 5 MLJ 405 ***(dist)***
PP v. Leong Kuai Hong [1981] 1 MLJ 246 FC ***(refd)***
R v. Cuthbertson [1980] 2 All ER 401 HL ***(refd)***
Saw Thean Teik v. Regina [1953] 19 MLJ 124 ***(dist)***
Stephenson v. Higginson [1851] 3 HL Cas 638 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 399(1), (2), 427
Dangerous Act 1952, ss. 2, 37(d), (da), 39B(1)(a), (2), 6
Evidence Act 1950, ss. 91, 92

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 47-9-91]

For the appellant - Karpal Singh; M/s Karpal Singh & Co
For the respondent - Azahar Mohamed (Ganesan Somasundram with him)

Reported by WA Sharif

JUDGMENT

Chong Siew Fai CJ (Sabah & Sarawak):

This appeal was against the decision of the High Court at Johor Bahru in which the appellant was convicted on a charge of drug trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentenced to death under s. 39B(2) thereof. At the conclusion of the hearing, we unanimously allowed the appeal, quashed the conviction and set aside the death sentence. As conceded on behalf of the appellant, which we considered justified, we substituted therefor a conviction under s. 6 of the Act and, after hearing the plea in mitigation, sentenced the appellant to imprisonment for a term of 16 years with effect from the date of his arrest and 10 strokes of whipping. We had then indicated that the grounds of the judgment would be given later, which we now do.

The charge against the appellant reads:

> Bahawa kamu pada 31hb Oktober 1990, jam lebih kurang 7.45 malam, di kawasan rumah setinggan di Jalan Kubur; Kampong Bakar Batu, di dalam daerah Johor Bahru, dalam Negeri Johor, telah didapati mengedar dadah berbahaya iaitu cannabis, sejumlah berat 1784.8 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

Case For Prosecution

Briefly, the case for the prosecution is this:

Acting on information received on 31 October 1990 at 7pm, detective police constable Hairuman b. lhsan (PW5) together with detective police constable Haron b. Pandak (PW6) and one DPC Sharif went to a squatter-area in Kampong Bakar Satu, Jalan Kubur, Johore Bahru. Upon arrival at 7.45pm, the police party entered a lane between some houses where they met the appellant carrying a package (exh. P6) in his right hand. PW5 identified himself as a police officer. This prompted the appellant to take flight and, in so doing, dropped the package (exh. P6) which he carried.

The policemen immediately took steps to prevent the appellant from escaping, resulting in a scuffle between the policemen and the appellant. The appellant was finally overpowered and arrested. PW5 retrieved the package (exh. P6) dropped by the appellant. An examination of the package in the presence of the appellant revealed it to contain two smaller plastic packages (exh. P7 and P8). Upon opening the two packages, PW5 found each to contain dried leaves which he believed to be cannabis. The appellant was then taken to PW5's office at the Police Headquarters of Johore Bahru. At 9.35pm the same night, PW5 handed over the appellant and the said packages to PW7, the investigating officer of this case.

PW7 testified that on 5 November 1990 at 9am he sent the packages to PW3, the chemist, and received them back from the chemist on 20 March 1991 at about 11am.

In his evidence, PW3 testified that to determine whether the dried leaves in the two packages (exh. P7 and exh. P8) were cannabis, he conducted the four standard tests which were:

(i) Physical examination;

(ii) Microscopic examination;

(iii) Duquenois Levine test; and

(iv) Thin Layer Chromatography test

From the first test, PW3 discovered that all the plant-materials from the two packages were of the genus cannabis. The second test, that is the microscopic examination of the said plant materials, revealed that there were a lot of resins in their original form and the plant-materials had the same morphological features as those found in cannabis. From the Duquenois Levine test, PW3 found the presence of 'cannabenoid' as to be found in cannabis, and from the thin layer chromatography test, he discovered that the cannabenoid contained similar active ingredients as found in cannabis.

It was not in dispute that a copy of the chemist's (PW3's) report (exh. P11) on the examination and analysis of the aforesaid plant-materials was served on the appellant in the Johore Bahru prison on 28 July 1991.

On the above evidence, the learned trial judge held that a *prima facie* case had been made out against the appellant and that the prosecution had also successfully raised the statutory presumptions under s. 37(d) and (da) of the Act. The learned trial judge then called on the appellant to enter upon his defence.

Defence Case

The appellant elected to give evidence under oath. Briefly, his defence was one of guarding the package exh. P6 (which he called the bag) without knowledge of the contents therein. He testified that on the night in question at 7.20pm, his friend one Markan came to his house in Kampong Bakar Batu asking him to accompany Markan to meet another friend, Haizam. The appellant said when he came out of his house, Haizam was already outside, carrying a bag. He followed the two of them and arrived at the squatters-area where they asked him to guard Haizam's bag after Haizam had taken a plastic package therefrom, saying that they (Haizam and Markan) wanted to meet another friend of theirs. Haizam and Markan then left. The appellant claimed that it was whilst he was standing beside the bag waiting for them that the police arrived and arrested him. After the arrest, he was handcuffed and taken to sit beside a car. Shortly thereafter, Haizam was also brought by the police to the car. Both of them were then taken to the police station. The appellant denied any knowledge of the contents of the plastic bag and denied having seen what was inside it as it was dark.

Under cross-examination, the appellant said he came to know Haizam only that night. He admitted that his relationship with them was good and saw no reason why they would frame him. The appellant also stated that when the police arrested him, the plastic bag was about 6 to 7 feet away from him and had been left with him for about 15 minutes.

Findings Of The Trial Judge

In his judgment, the learned trial judge disbelieved the appellant. He was of the view that the defence was an afterthought and that Markan and Haizam were fictitious persons and were the products of the appellant's imagination since PW5 and PW6 were never cross-examined about their existence.

Secondly, the learned trial judge considered it improbable that the appellant would have helped looking after Haizam's bag at the latter's request since he had only met Haizam that very night. The learned trial judge found it hard to accept that the appellant did not suspect anything amiss about the said bag especially when Haizam had taken therefrom a plastic package before leaving the bag with the appellant.

Thirdly, the learned trial judge found PW5 and PW6 to be witnesses of truth, having no reason to lie in court and to frame the appellant

On the totality of the evidence, the learned trial judge found that the appellant had failed to raise any reasonable doubt on the prosecution case and had failed to rebut the statutory presumptions under s. 37(d) and (da) on a balance of probabilities.

The Appeal

On behalf of the appellant, four grounds of appeal were advanced before us. They may be stated as follows:

(1) that there was ambiguity in the chemist's (PW3's) evidence as to whether the alleged drug was cannabis or Indian Hemp;

(2) that the chemist's evidence was inadequate to prove that the subject-matter of the charge was cannabis;

(3) that the learned trial judge erred in law in invoking s. 37(da) of the Act based on the presumption under s. 37(d) of the same Act; and

(4) that the learned trial judge erred in not distinctly and separately dealing with the presumption under s. 37(da) of the Act.

Before us, Mr Karpal Singh, learned counsel for the appellant took the above grounds (1) and (2) together and then grounds (3) and (4) separately. We would do likewise.

Grounds (1) and (2)

Mr. Karpal Singh conceded that the chemist did explain the four tests he had conducted and did say that the plant-materials which he analysed were cannabis as defined in the Act. It was also not disputed that the chemist report (exh. P11) had been duly served on the appellant under s. 399 of the Criminal Procedure Code. Counsel, however, contended that having thus relied on the said s. 399 (ie, service of a copy of the report on the appellant), it was not open to the prosecution to call the chemist as a witness, citing *PP v. Lam Peng Hoa and Another* [1996] 5 MLJ 405 and *Saw Thean Teik v. Regina* [1953] 19 MLJ 124 in support. Mr. Karpal Singh also submitted that the said s. 399 postulated the chemist's report to be in writing, and that s. 91 of the Evidence Act 1950 applied with the consequence that the chemist could not be permitted to testify on the four tests which he had conducted as they were not stated in his report.

On the other hand, the learned Deputy Public Prosecutor, so far as was relevant to the issue in point, submitted to the effect that to render ss. 91 and 92 of the Evidence Act 1950 applicable, the matter must be "required by law" to be reduced in writing, and that a chemist report was not required by law to be so reduced. He further contended that by the *ejusdem generis* rule, the chemist's report did not come within the ambit of the said ss. 90 and 91.

The relevant parts of s. 399(1) and (2) of the Criminal Procedure Code reads:

> (i) Any document purporting to be a report under the hand of any of the persons mentioned in subsection (ii) of this section upon any person, matter or thing examined or analysed by him ... may be given in evidence in any inquiry, trial or other proceeding under this Code unless such person ... shall be required to attend as a witness –
>
> (a) by the court; or
>
> (b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:
>
> Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy thereof to the accused not less than ten clear days before the commencement of the trial.
>
> (ii) The following are persons to whom the provisions of this section apply:
>
> ...;
>
> (c) Chemists in the employment of any Government in the Federation or of the Government of Singapore;
>
> ...

With respect, we did not consider that the prosecution was precluded from calling PW3, the chemist, (the maker of the report exh. P11) to prove its case in the ordinary way solely because it had served a copy of the report on the accused prior to the commencement of the trial pursuant to s. 399(1) of the Criminal Procedure Code. In other words, service of a copy of the report on the accused pursuant to the said s. 399(1) is, in itself, no bar to the prosecution from subsequently calling the maker of the report as a witness instead of relying on production of the report as substantive evidence. Section 399(1) merely renders permissible the admission in evidence the reports of the categories of persons set out in sub-s. (ii) thereof (PW3 belonged to one of such categories) without calling the makers as witnesses provided that the pre-condition of service of copies of the reports as laid down in the said s. 399(1)

had been duly complied with. It merely enables the report to be used but does not make it obligatory for the prosecution to make the report substantive evidence simply because it had served a copy thereof upon the accused in pursuance of the said s. 399(1). The object of dispensing with the calling of the categorised persons as witnesses was probably to avoid the expenses, delay or inconvenience which would be caused if they were to testify in court in person. But even then, such persons would have to be called as witnesses if required by court or if needed, upon due notification, by the accused. In this case presently under appeal, an important point to note is that the prosecution decided to call PW3 rather than relying on his report exh. P11, which it had served, as substantive evidence. Had the prosecution persisted to act under the said s. 399(1) and tendered the report in court to establish that part of its case, then the rule might apply that the contents of the report must be proved by the report itself, and not by parole evidence; but that was not what the prosecution did. In fact the prosecution called PW3, the maker of the report; by so doing, the prosecution not only had complied with the best evidence rule – the rule that the best evidence of which the subject (or the nature of the thing) is capable ought to be produced – but had also afforded the appellant the benefit of cross-examining PW3, an opportunity of which erstwhile counsel for the appellant had indeed availed himself in this case.

Furthermore, we saw nothing improper in the production of the report (exh. P11) by PW3 as maker thereof in the course of his giving evidence in court in this case. A perusal of the Appeal Record (pp. 10 to 17) would reveal that the primary evidence of PW3 came from his oral testimony. It is clear from the oral evidence that the report (exh. P11) was produced not even as corroborative evidence but was merely mentioned and identified as one of the items handed over to the investigating officer PW7. This is what PW3 said:

> Saya juga serahkan lapuran kimia kepada beliau ... Ini dia lapuran kimia saya (P11). (Page 15 of the Appeal Record).

Moreover, the defence did not at all cross-examine on the report.

In point of law, where a maker of a report is called as a witness, there is nothing to prevent him from tendering his report for the purpose of corroborating his own evidence though, as we have stated earlier, that was not the purpose for which exh. P11 was tendered by PW3 in this case. In *Saw Thean Teik v. Regina, supra*, which dealt with s. 427 of the Criminal Procedure Code (Cap. 21) which was in *pari materia* with s. 399 of our present Criminal Procedure Code (except for one category of persons in sub-s. (ii)), Spenser Wilkinson J said: (at p. 125)

> When a Medical Officer is giving oral evidence then of course any notes which he may have made at the time of his examination he can refer to refresh his memory. Moreover, if his report is made at about the time when his examination took place the report could be put in not as primary evidence of its contents but to corroborate the oral evidence already given under s. 157 of the Evidence Ordinance.

And, (at p. 126)

> Technically, however, it is wrong for a witness in a criminal case to produce a report as a substitute for oral evidence. Clearly, if the witness is in the witness box the best evidence is his oral evidence as to what he saw or discovered (see s. 60 of the Evidence Ordinance). Where witnesses of this kind are brought to court their reports would only be used, if at all, either to refresh memory or as corroboration.

Simliarly in *PP v. Lam Peng Hoa & Anor, supra,* Kang Hwee Gee J applying *Saw Thean Teik v. Regina, supra,* said: (at p. 412)

> It is trite law that if a chemist is called as a witness to testify on matters pertaining to his analysis of the drug, the chemist report prepared by him would not be admissible, save that it may be tendered not as substantive evidence of its contents, but as corroboration of his oral evidence in court under s. 157 of the Evidence Act.

On the issue presently under consideration, *PP v. Lam Peng Hoa & Anor, supra,* so far as from the relevant facts that may be gathered in the judgment of Kang Hwee Gee J, is distinguishable. There the chemist's report was tendered as conclusive or substantive evidence of the contents therein stated. Subsequently, attempt was made to call the chemist to explain the conduct of her analysis in the drug or as stated in the heading of the judgment appearing at p. 412: "TO CALL CHEMIST TO CLARIFY REPORT".

As regards *Saw Thean Teik v. Regina, supra,* we also did not find it of assistance. That was a dangerous driving case and the issue was the evidence of intoxication. Such evidence was purported to have come from a medical officer and a chemist. Both were called as witnesses and both tendered their respective reports which, for reasons not relevant for our purpose, Spenser Wilkinson J held inadmissible. Unfortunately it is not clear from the judgment what exactly or substantially were their oral testimonies in court. However, it appears obvious that little, if any, was said in their oral evidence about the issue of intoxication. In coming to the conclusion lastly stated, we base on the following excerpts in the judgment:

(1) Respecting the medical officer

The doctor's report was very much stronger than the report of the Chemist and it is impossible to know what his evidence would have been had he depended entirely upon his recollection assisted by any notes he may have made at the time (p. 125)

(2) Respecting the chemist

Spenser Wilkinson J, after holding that the chemist's report was inadmissible because the chemist was called as a witness and because of failure to serve the requisite notice under s. 427 of the Criminal Procedure Code (Cap. 21), said: (p. 126)

I do not attach much importance to this point, because I have no doubt that **if he had been properly examined his evidence would have been identical with the contents of his report. Technically; however, it is wrong for a witness in a criminal case to produce a report as a substitute for oral evidence.** Clearly; if the witness is in the witness box the best evidence is his oral evidence as to what he saw or discussed (see s. 60 of the Evidence Ordinance). Where witnesses of this kind are brought to court, their reports should only be used, if at all, either to refresh memory or as corroboration. (emphasised added).

In the instant case before us, the chemist's report exh. P11 was, as we have earlier stated, produced as one of the items handed over to PW3 and not even for purpose of corroboration.

Briefly put, in our view:

(1) the fact that service of the notice of intention to produce the chemist's report under s. 339(i) of the Criminal Procedure Code, *per se*, would not preclude the prosecution from declining to tender the report in evidence pursuant to the said s. 339(i) and calling the chemist PW3, as maker of the report, to give evidence at the trial instead;

(2) from the Appeal Record it is obvious that PW3 gave substantive evidence in his oral testimony in court and that the report (exh. P11) was merely tendered as one of the items handed over by him to PW7; and

(3) that the chemist report, even assuming that it was not tendered for the purpose of its being identified as an item handed to PW7, was no more than corroborative evidence affirming PW3's evidence that he had examined and analysed the suspected plant-materials and found them to be cannabis under the Dangerous Drugs Act 1952.

In the light of the above view that we take, it is unnecessary to discuss and rely on ss. 91 and 92 of the Evidence Act 1950.

The next question is whether the chemist's evidence was sufficient to prove that the subject-matter of the charge was cannabis. 'Cannabis' is defined in s. 2 of the Act as to mean

> any part of any plant of the genus cannabis from which the resin has not been extracted, by whatever name it may be designated.

As stated earlier, Mr. Karpal Singh conceded, and rightly so, that PW3, the chemist, had stated in his evidence that the plant-materials which he had analysed was

> 'cannabis' as defined in the Dangerous Drugs Act 1952

without mentioning "s. 2" and that he had conducted the four tests which he explained. The chemist had also testified that from the four tests he had conducted, more particularly the microscopic test and the Duquenois Levine test, he detected the presence of resins and discovered that resins had not been extracted from the said plant-materials ie, an ingredient of the definition of 'cannabis' in s. 2 of the Act as stated above. Despite the omission of stating "s. 2", on the evidence, we entertained no doubt that the plant-materials seized from the appellant and analysed by PW3 was cannabis as defined under s. 2 of the Dangerous Drugs Act 1952. *Mohd Yusof bin Said v. PP* [1996] 1 MLJ 640 FC.

We therefore saw no merit in grounds (1) and (2).

Ground (3)

Section 37(d) and the relevant part of s. 37(da) of the Act provides:

> 37. In all proceedings under this Act or any regulation made thereunder ...
>
> (d) any person who is found to have had in custody or under his control **anything whatsoever containing** any dangerous drug shall, until the contrary is proved; be **deemed** to have been in possession of such drug and shall, until the contrary is proved; be **deemed** to have known the nature of such drug;
>
> (da) any person who **is found** in possession of ...
>
> (vi) 200 grammes or more in weight of cannabis ... otherwise than in accordance with the authority of this Act or any other written law; shall be presumed; until the contrary is proved; to be trafficking in the said drug; (emphasised added)

In his judgement, the learned trial judge, after relating the evidence adduced by the prosecution as stated earlier herein, said:

> Justera itu, setelah mendengar hujah-hujah yang dikemukakan oleh kedua-dua pihak saya berpuas hati Pendakwaan telah berjaya membuktikan satu kes *prima facie* terhadap Tertuduh. Pendakwaan juga berjaya menimbulkan anggapan-anggapan statutori dibawah s. 37(d) dan (da) Akta Dadah Berbahaya 1952 terhadap Tertuduh. Tertuduh dipanggil membela diri.

[Translation:

> After hearing the submissions presented by both parties, I was satisfied that the Prosecution had established a *prima facie* case against the accused. The Prosecution had also successfully raised the statutory presumptions under s. 37(d) and (da) of the Dangerous Drugs Act 1952 against the accused. The accused was called to enter upon his defence.]

Then, the learned trial judge after dealing with the defence case, which he rejected, concluded:

> Tertuduh juga gagal menyangkal anggapan-anggapan statutori di atas imbangan kebarangkalian. Sebaliknya pendakwaan telah membuktikan kesnya tanpa sebarang keraguan munasabah. Tertuduh didapati bersalah dan dikenakan hukuman mati mandatori.

[Translation

> The accused also failed to rebut the statutory presumptions on balance of probabilities. On the other hand the Prosecution had established its case beyond reasonable doubt. The accused was found guilty and sentenced to death.]

It is necessary to bear in mind that the ensuing discussion of s. 37(da) of the Act rests on the basis that the requirement of the minimum quantity as stipulated in the subsection has been fulfilled.

Mr. Karpal Singh for the appellant, took exception to the two passages of the learned trial judge quoted above. He drew our attention to the words "found in possession" in s. 37(da) of the Act and contended that since the appellant was only **deemed** by the learned trial judge **to be in possession** of the cannabis under s. 37(d) of the Act, the presumption of trafficking under s. 37(da) could not be invoked in aid of the case for the prosecution. In other words, it was the contention for the appellant that in order to invoke s. 37(da), there must be an actual finding of possession as opposed to "deemed" possession; otherwise there would be one presumption upon another presumption, which was not what the two subsections permitted. As persuasive

authorities, reference were made to ss. 17 and 18(1) and (2) of the Misuse of Drugs Act (Chapter 185) of Singapore, Revised Edition 1997 (hereinafter referred to as "the Singapore Act") and the Singapore case of *Low Kok Wai v. PP* [1994] 1 SLR 676 CCA.

The learned Deputy Public Prosecutor argued otherwise. He submitted that the presumption of trafficking under s. 37(da) could be properly invoked once a presumption of possession under 37(d) had been established. He urged upon us not to depart from the past decisions of our courts on the double application of the presumptions of possession and trafficking. Among the cases of this court cited, *PP v. Adetunji Adeleye Sule* [1993] 2 MLJ 70 SC warrants special mention. In that case, the accused was found in possession of a trunk in which heroin was discovered. It was held by the Supreme Court, on appeal, that he was deemed to be in possession of the drug and to have known the nature of the drug by reason of s. 37(d) of the Act and was further presumed to be trafficking in the drug, by reason of s. 37(da) thereof. In the course of arguments before us, doubt was expressed as to whether the point now canvassed before us (ie, the application of s. 37(da) upon a finding of custody or control under s. 37(d)) was raised in *PP v. Adetunji Adeleye Sule, supra.* Tan Sri Edgar Joseph Jr J, a member of this panel, who was also on the panel in *PP v. Adetunji Adeleye Sule, supra,* and delivered the judgment of the court, with an air commanding high respect, candidly confirmed that the point had not been argued in that appeal. Likewise, the learned Deputy Public Prosecutor also fairly and frankly conceded that the point was never previously argued and decided. That being so, we see no purpose of discussing the other cases cited by the learned Deputy Public Prosecutor, in relation to the point in issue. The concession of the learned Deputy Public Prosecutor also explained why we ought to deal with the issue since it had been specifically raised.

The learned Deputy Public Prosecutor further submitted, albeit vaguely, that the intention of Parliament was to render the automatic application of s. 37(da) once s. 37(d) of the Act had been successfully invoked, as illustrated in previous cases decided by our Malaysian courts. He also referred to the following excerpt in the statement of the then Deputy Minister of Law, Encik Rais Yatim, made in Parliament when moving the Dangerous Drug (Amendment) No. 2 Bill on 15 December 1976, as reported in *"Parliamentary Debates"* Jilid II Bil. 69 col. 7343 (for brevity, "the Hansard"):

> Fasal 3 Rang Undang-undang Akta Dadah Berbahaya (Pindaan) (No. 2) 1976 ini bertujuan juga membuat peruntukan supaya sesiapa juga yang memiliki satu ratus gram heroin atau seribu gram morphine atau lima (5) kilogram candu atau dua ratus gram ganja atau lebih melainkan dengan kebenaran yang diberi oleh Ordinan ini atau mana-mana undang-undang bertulis, hendaklah dianggap,

> sehingga dibuktikan sebaliknya sebagai "trafficking" Dadah Berbahaya. Anggapan ini akan banyak menolong pihak yang menguatkuasakan undang-undang ini.

The learned Deputy Public Prosecutor submitted that the words 'found in possession' in s. 37(da) must be construed to mean either actual or presumed possession in order to give efficacy to the intention of the Parliament in enacting s. 37(da) ie, to combat drug trafficking.

As regards the Singapore legislation and the case of *Low Kok Wai v. PP supra,* the learned Deputy Public Prosecutor urged upon us not to rely on them in view of the difference in the wordings of the statutes of the two countries.

In the alternative, the learned Deputy Public Prosecutor contended that even without the aid of s. 37(da), there was sufficient evidence in this case establishing that the appellant was in manual possession and with knowledge of the cannabis. He therefore submitted that the conviction ought to stand.

In deciding this issue, it is necessary, first and foremost, to bear in mind that both sub-ss. (d) and (da) of s. 37 of the Act, being penal provisions, must be strictly construed, and must not be extended beyond their clear meaning. *Liew Sai Wah v. PP* [1968] 2 MLJ 1 PC; *PP v. Leong Kuai Hong* [1981] 1 MLJ 246 FC. See also *Stenhenson v. Higginson* [1851] 3 HL Cas 638 where Lord Truro observed: (p. 686)

> ... but in a penal enactment, where you depart from the ordinary meaning of the words used, the intention of the Legislature that those words should be understood in a more large or popular sense, must plainly appear.

And, in *R v. Cuthbertson* [1980] 2 All ER 401 HL where a forfeiture provisions in the Misuse of Drugs Act 1971 (English) was called for construction, Lord Diplock observed: (p. 404)

> The fact that the section is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than that they would ordinarily bear.

The wordings of sub-ss. (d) and (da) of s. 37 are clear and unequivocal. That being so, their meanings must be determined from the language employed and the two subsections must be taken to mean exactly what they respectively say. Also, generally speaking, if the words in a statute admit of two interpretations, then they are not clear, and if one interpretation is more favourable to an accused than the other, the court will adopt the one more favourable to the accused.

Since the literal meanings of the two subsections are intelligible, they must not be extended on the ground that there has been a slip or a matter not provided for which should have been provided for. Any ambiguity or slip would be a matter for the Legislature. In *Magor And St. Mellons Rural District Council v. Newport Corporation* [1952] AC 189 HL Lord Simonds observed: (191)

> The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited ... If a gap is disclosed, the remedy lies in an amending Act.

In our view, there is a clear undeniable distinction between the word "deemed" used in s. 37(d) and the word "found" employed in s. 37(da) of the Act. The 'deemed' state of affairs in s. 37(d) (ie, deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs ie, the finding of custody or control. Such presumptions as under s. 37(d) (and, for that matter, the one under s. 37(da)) are sometimes described as "compelling presumptions" in that upon proof of certain facts by a party (in our present case, proof of custody or control in s. 37(d) by the prosecution), the court **must** in law draw a presumption in its favour (ie, presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word "found" in the opening phrase of s. 37(da) connotes a finding after a trial by the court.

Furthermore, the basic or primary facts needed to raise "deemed" possession and "deemed" knowledge under s. 37(d) of the Act and those required to raise "presumed ... trafficking" under s. 37(da) are different. To come to the presumptions of possession and knowledge under s. 37(d), one need only to arrive at a finding of having had "in custody or under ... control anything whatsoever containing" the drug (as opposed to the drug itself) whereas to arrive at the presumption of "trafficking" under s. 37(da), a finding of being "in possession" of the drug is necessary (in addition, of course, to proof of the relevant minimum quantity specified). In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned Deputy Public Prosecutor – a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not.

In our view, to constitute "possession" under s. 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

As regards the submission of the learned Deputy Public Prosecutor on the intention of Parliament, the correct approach, in our opinion, is to ascertain the meaning of the words employed by Parliament rather than the intention of Parliament. As Lord Reid observed in *Black-Clawson International Ltd. v. Papierwerke AG* [1975] 2 WLR 513 HL @ 517:

> We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.

Respecting the Hansard quoted above and relied on by the learned Deputy Public Prosecutor, it sought to introduce into the Act the provision of presumption of trafficking which might be invoked upon proof of possession of certain quantities or above of various types of the dangerous drugs, unless the contrary is proved. The original form of the present s. 37(da), first enacted by way of the Dangerous Drugs (Amendment) (No. 2) Act 1977 (which was subsequently further amended), was the result of that legislative effort. However, with respect, for the purpose of the present issue under consideration, we were unable to find any assistance from the quoted statement of the then Deputy Minister of Law; but, even if there was, we were unable to refer to or rely on it since the 2 sub-sections which we were called upon to construe, suffer no ambiguity or obscurity. *Chor Phaik Har v. Farlim Properties Sdn Bhd.* [1994] 3 MLJ 345 FC; *Pepper (Inspector of Taxes) v. Hart* [1992] 3 WLR 1032 HL.

We next considered the legislation and the case law of Singapore submitted before us, noting the difference in the wordings of the Singapore legislation compared to those of ours and therefore necessitated careful scrutiny, and further bearing in mind, of course, that the Singapore decision, even if relevant, was of mere persuasive value.

Section 17 of the Singapore Act

Before 15 February 1990, s. 17 of the Singapore Act read:

17. Any person who is **proved or presumed to have had in his possession** more than –

...

...

(d) 2 grammes of diamorphine (heroin) contained in any controlled drug,

...

...

shall until the contrary is proved be presumed to have had the controlled drug in his possession for the purpose of trafficking therein. (emphasised added).

On 6 November 1991 (the date of the offence in *Low Kok Wai v. PP, supra*, which we shall discuss later), the said s. 17 of the Singapore Act read:

17. Any person who is **proved to have had in his possession** more than –

(c) 2 grammes of diamorphine;

...

...

whether or not contained in any substance, extract; preparation or mixture shall, until the contrary is proved, be presumed to traffic in that controlled drug. (emphasised added).

Thus as at 6 November 1991, the said s. 17 had omitted the words "or presumed" employed in the earlier version of the section reproduced above.

The material parts of the s. 18(1) and (2) of the Singapore Act provided thus:

18(1) Any person who is **proved to have had in his possession or custody or under his control** –

(a) anything containing a controlled drug,

...

...

shall, until the contrary is proved, be presumed to have had that drug in his possession.

(2) Any person who is **proved or presumed** to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug. (emphasised added).

A comparison of s. 37(da) of our Dangerous Drugs Act 1952 and s. 17 of the Singapore Act as on 6 November 1991 will reveal that in both cases to invoke the presumption of trafficking, the element of possession (to the minimum quantities as respectively stated therein) must first be proved or found. And, it is convenient to state here, in answer to the submission of the learned Deputy Public Prosecutor, that, for the purpose of the present issue in question, there is, in our opinion, no material difference between the words "proved to have had in ... possession" and the words "found in possession" used in the respective sections of the two Acts. Both necessitate a finding or proof of possession beyond reasonable doubt based on evidence.

In the Singapore case of *Low Kok Wai v. PP, supra,* the accused was charged with trafficking of no less than 29.62 grammes of diamorphine (a controlled drug listed in the First Schedule to the Singapore Act) on or about 6 November 1991. The drug was found in the boot of a car rented to and driven by the accused. At the trial at the first instance, the learned trial Judicial Commissioner held that by virtue of s. 17 of the Singapore Act in force 6 November 1991, the accused was presumed to have the drug for trafficking and had failed to rebut the presumption. The accused was convicted and sentenced to death. On appeal, one of the contentions on behalf of the accused was that the learned trial Judicial Commissioner had erred in applying s. 17(c) of the Singapore Act (as in force on 6 November 1991) to hold that the presumption of trafficking arose against the accused when the possession had only been presumed under s. 18 of the said Act and not proved. The court of Criminal Appeal upheld the contention and held that on a proper construction of the said s. 17 in force on 6 November 1991 (ie, without the words 'or presumed'), the presumption of trafficking provided thereunder could not be applied where possession had not been proved independently but merely presumed by virtue of s. 18 of the said Act. Though not relevant for our purpose, we would add, however, for the sake of completeness, that the appeal was dismissed on the ground that there was overwhelming evidence pointing to the accused being a trafficker.

Delivering the judgment of the appellate court, Chao Hick Tin J, after tracing the legislative history of ss. 17 and 18 of the Singapore Act said: (p. 683 F-I):

a It seems to us clear that in the Act 'proof' is different from 'presumption'. This is apparent from s. 18. Subsection (1) of s. 18 provides that 'any person who is proved to have had in his possession ... any keys of anything containing a controlled drug ... shall ... be presumed to have had that drug in his possession'. Subsection (2) of s. 18 provides that 'any person who is **proved or presumed** to have had a controlled drug in his possession shall ... be b presumed to have known the nature of that drug'.

The earlier version of s. 17 (pre-15 February 1990) included the words 'or presumed'. By omitting those two words in the later version, Parliament must have intended that the presumption of trafficking in s. 17 was only to apply where a person was proved to be in possession of a controlled drug and not c merely presumed to be in possession of a controlled drug. If Parliament had intended s. 17 to also apply to the situation of 'presumed' possession, then it would not have deleted those two words. It is a rule of construction that a word in a statute must bear the same meaning unless the context clearly otherwise requires. The word 'proved' must bear the same meaning in s. 17 as in s. 18. In our judgment, Parliament; by deleting the words 'or presumed', d had shown abundantly that it did not intend to create a situation of triple presumption, namely, by linking ss. 18(1), 18(2) and 17.

Having considered the submissions of counsel and the learned Deputy Public Prosecutor, and the law applicable including the rules of construction of penal e statutes, we were of the view that the word "found" in s. 37(d) must bear the same meaning as the word "found" in s. 37(da). Both require evidential materials in attaining proof thereof and are vastly different from the word "deemed" employed in the said s. 37(d).

In our view, on the wording of s. 37(da) as it stands, to read the presumption f of possession (ie, possession as understood in Criminal law, with knowledge) provided in s. 37(d) into s. 37(da) so as to invoke against an accused a further presumption of trafficking (ie, presumption upon presumption) would not only be ascribing to the phrase "found in possession" in s. 37(da) a meaning wider than it ordinarily bears but would also be against the established principles g of construction of penal statutes and unduly harsh and oppressive against the accused. We are not unaware that, as general principle, a statute may place the burden of proof on an accused by necessary implication and without doing so expressly. This depends on the construction of the particular legislation. But a court should be extremely cautious and slow to infer from a statute that h Parliament intended to impose on the defendant an onerous duty to prove his innocence in a criminal case. Furthermore, offences involving the trafficking of dangerous drugs are among the most serious in the criminal calendar. Any ambiguity in s. 37(da) should be resolved in favour of the accused by placing the burden of proving possession of the substances involved on the prosecution.

i

We would further add that in so construing as we do, we see no injustice to the prosecution. In a proper case where the evidence so warrants and the amount of the dangerous drug reaches or exceeds the quantity specified in s. 37(da); there is nothing to prevent a trial court from coming to a factual finding of possession as understood in criminal law thereby attracting the presumption of trafficking under the said s. 37(da) which, of course, is rebuttable.

Accordingly, we held that the learned trial judge had erred in law in using the presumption of possession under s. 37(d) of the Act to invoke the presumption of trafficking under s. 37(da) thereof.

In coming to the above conclusion we were fully aware of the distinguishing feature in the amendment to s. 17 of the Singapore Act by the deletion of the words "or presumed" which our s. 37(da) did not experience because the two quoted words were never a part of our said subsection. However, we wish to make clear that our conclusion rested not on the legislative amendment and the case law of Singapore dealt with earlier which were no more than mere persuasive reasoning and were being used merely for illustration, but rather on the general principles of construction of statues including that penal enactments are to be construed strictly and that words in a statute that are plain and unambiguous are to be given their plain, ordinary and common usage meaning.

Alternative Submission Of Possession

As regards the alternative submission or the learned Deputy Public Prosecutor that, independently of s. 37(d), there was sufficient evidence of possession of the cannabis on the part of the appellant, all we need to say is that on the evidence the learned trial judge did not make a finding of possession (ie, possession as understood in criminal law) either factually or by way of inference. We, at the appellate stage, not having had the opportunity of observing the witnesses in giving evidence, did not consider it appropriate and safe to arrive at any conclusion in this regard.

Ground (4)

This ground relates to the desirability of conducting a separate exercise to determine whether the statutory presumption of trafficking under s. 37(da) of the Act had been rebutted as laid down in *Mohamad Radhi bin Yaakob v. PP* [1991] 3 MLJ 169 SC. In the light of our opinion under Ground (3) above which rendered s. 37(da) inapplicable, we found it unnecessary to deal with this ground.

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Conclusion

For the above reasons, we had allowed the appeal, quashed the conviction and set aside the sentence. In substitution therefor, we convicted and sentenced the appellant as stated at the commencement of this judgment.

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